

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

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3 OKSANAN TIMOSHENKO, 17-CV-4472 (ILG)  
4 Plaintiff, United States Courthouse  
5 - versus - Brooklyn, New York  
6 May 04, 2018  
7 MULLOOLY, JEFFERSON, 12:00 p.m.  
8 ROONEY & FLYNN LLP  
9 Defendants.

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10 TRANSCRIPT OF CIVIL CAUSE FOR ORDER TO SHOW CAUSE  
11 BEFORE THE HONORABLE I. LEO GLASSER  
12 UNITED STATES SENIOR DISTRICT JUDGE

13 APPEARANCES

14 Attorney for Plaintiff: Law Office of Igor Litvak  
15 1701 Avenue P  
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17 BY: IGOR LITVAK, ESQ.

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24 Proceedings recorded by mechanical stenography. Transcript  
25 produced by computer-aided transcription.

1 (In open court.)

2 THE COURTROOM DEPUTY: All Rise. Order to show  
3 cause, Timoshenko versus Mullooly and Flynn.

4 Counsel, come forward state your appearances for the  
5 record.

6 MR. LITVAK: Igor Litvak on behalf of Timoshenko.  
7 Good afternoon, your Honor.

8 MR. ARLEO: Good afternoon, your Honor, Robert  
9 Arleo, counsel for Mullooly Jefferson.

10 THE COURT: Did you say your name was Litvak?

11 MR. LITVAK: Igor Litvak.

12 THE COURT: Do you want to be heard?

13 MR. LITVAK: Yes, your Honor. The gist of my order  
14 to show cause, your Honor, is the fact that when I filed that  
15 complaint, and when I litigated the motion to dismiss, I was  
16 relying on Balke. In Balke the Court relied on Carlin and on  
17 Avila. Specifically stated that even though the letter in  
18 that case had a safe harbor language, without any clarifying  
19 reason as to why, the Court in that case found there to be a  
20 violation. Basically, it said that it was not enough to say  
21 that the balance may increase or will increase. You have to  
22 say exactly -- you have to give details as how much it will  
23 increase and other things like that.

24 Therefore, when I saw the letter at issue in our  
25 case, where the language was similar, and I looked at that

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1 letter, and I basically thought to myself, this is an  
2 opportunity to expand or to modify or distinguish the Second  
3 Circuit precedent; and that's what we did.

4           There definitely has not been a subjective bad faith  
5 on my part, whatsoever, in filing that case. I think relying  
6 on Balke it's clear that there was a claim made with some  
7 color. Now, the Court is willing -- is free to disagree with  
8 that assessment, and I have been wrong on the law, but that  
9 doesn't rise to the level of bad faith, frivolous cause.

10           This is what the motion practice is all about. You  
11 debate the law. And you get a decision. You move on.

12           There was definitely no bad faith, your Honor,  
13 whatsoever.

14           Again, other judges that -- actually there was a  
15 recent decision from Judge Cogan, which had a similar issue in  
16 that case. I have the decision, I can give it to you. And  
17 although the judge dismissed the complaint, Judge Cogan  
18 dismissed the complaint, the judge did not issue any sanctions  
19 whatsoever.

20           Again, in your decision, as I mention in my order to  
21 show cause, you made two findings. The first finding, in  
22 Carlin the issue was the G, 692(G); Avila concerns 692(E), as  
23 I mentioned in my order to show cause. The analysis has been  
24 the same as to G and as to E. There is multiple courts, even  
25 Balke, found there to be a G violation and E violation.

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1 Courts in other circuits, other districts, have found, have  
2 stated that analysis for the purposes of, for the purpose of  
3 legal analysis, G and E is the same.

4 Furthermore, your Honor, in your order you mentioned  
5 that there was no safe harbor disclosure in Balke. Actually  
6 there was, there was a safe harbor disclosure on Balke. You  
7 don't have to have a specific language to have a safe harbor  
8 disclosure.

9 The point is, that letter specifically stated, your  
10 balance may increase. The Court in that case still found  
11 there to be a violation.

12 So therefore, relying on Balke, your Honor, I don't  
13 believe the Court could say there was suggestive bad faith,  
14 frivolous cause.

15 I think it was reasonable to rely on Balke. And  
16 Balke relied on Avila and on Carlin. So because of that, it  
17 was reasonable for me to do that as well.

18 Now the Balke court did not actually go into much  
19 detail to explain why they found it to be not enough; they  
20 just said it was not enough. So therefore, we went with that  
21 argument. We tried to expand the law, to modify the law. It  
22 has never been found to be sanctionable to overturn the  
23 precedent. That's what law is about, that's what motion  
24 practice is about.

25 FDCPA doesn't know anything about the FDCPA, that's

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1 how these cases come out. Attorneys try to modify it somehow.  
2 They argue. They come out with these novel theories.

3 Last, this is more true in every CPA litigation.  
4 Because when it comes to that debt collectors, nobody  
5 regulates them. The FDCPA attorneys, they are under the  
6 Attorney Generals when it comes to that field. So therefore,  
7 we have to go a step, sometimes a step beyond, and come up  
8 with creative legal arguments in order to regulate the  
9 industry.

10 Therefore, your Honor, I think for those reasons the  
11 Court should not order any sanctions whatsoever in order to  
12 refuse.

13 MR. ARLEO: Good afternoon, your Honor, I've heard  
14 Mr. Litvak. And initially, I'm not a solely FDCPA defense  
15 lawyer. As your Honor may recall, I did plaintiff consumer  
16 work, I represent both.

17 Here you have the Second Circuit telling debt  
18 collectors, if you use this language you'll be safe and  
19 protected.

20 The Carlin decision has nothing to do with this  
21 case. The Carlin decision was a clearly different letter.  
22 The amount of the debt was very confusing, it may include past  
23 things, it may not include. It's totally irrelevant to this.

24 The Balke letter did not have the full Avila letter,  
25 which more importantly the Balke letter left off that portion

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1 of the safe harbor language that said, the day you pay might  
2 be different, please write us or call us. So here that letter  
3 was clearly distinguishable.

4 There is nothing Mr. Litvak can say here that is  
5 going to look at this and say you sued my client for doing  
6 what the Second Circuit told them to do.

7 As far as modifying, reversing, arguing against,  
8 what good is a safe harbor language if a debt collector,  
9 hard-working, honest lawyers -- who I can tell, your Honor,  
10 Mr. Mullooly is here today. I've known him for 20 years. He  
11 retains me to make sure his letters are in compliance. He's  
12 not the type of collection agency that Congress was looking to  
13 corral.

14 And what I did with Mr. Litvak was instead of filing  
15 a motion to dismiss or sending him a Rule 11 letter, I don't  
16 want to do that, I just pointed out, you're wrong, here is why  
17 you're wrong.

18 I think your Honor was very correct when you put in  
19 the decision, this is about cost of defense settlements. This  
20 is about filing multiple FDCPA lawsuits. That Avila decision  
21 alone put the Eastern District of New York until recently  
22 number one in FDCPA filings.

23 The other thing I don't understand, your Honor, how  
24 come there is never any pre-communication with the collection  
25 agency to say, here is what I think is wrong with your letter,

1 before filing the lawsuit. They don't do that. I do that.

2 You just file a lawsuit. What does that entail,  
3 your Honor, that entails insurance coverage, that entails  
4 liability, that entails explanations to creditors.

5 What the defendant did here was exactly what the  
6 Second Circuit said they could do to avoid liability.  
7 Mr. Litvak didn't respect that. And very convincingly, your  
8 Honor, they had the chance to change Avila in the Carlin case  
9 if they wanted to. They could have and they didn't.

10 Where does of leave debt collectors? Where does it  
11 leave them because it's a punching bag, it's a whack-a-mole.  
12 Now I got you, now I got you again, because I'm allegedly  
13 arguing.

14 Here there is clearly no basis for this lawsuit. I  
15 agree with your Honor's decision.

16 MR. LITVAK: Your Honor, can I just respond real  
17 quick. The Court in Avila did not say you can use any  
18 language. The purpose of Avila is to advise the debtor that  
19 the balance may or will increase. This is what happened in  
20 the Balke letter. The Balke letter stated your balance may  
21 increase, that's the safe harbor language. You don't have to  
22 use a specific language.

23 The letter stated the balance may increase. The  
24 Court in that case, even though the letter stated the balance  
25 may increase, and that's the safe harbor language, the Court

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1 still stated that was not enough. The Court stated, you have  
2 to provide more than that, that's not enough.

3 So looking at the Balke decision, the Balke decision  
4 which relied on Carlin and Avila, looking at that decision you  
5 can say, I can modify, I can change the Second Circuit  
6 precedent. That's fine. That's done all the time. That's  
7 not an issue. That's never been found to be sanctionable.

8 So therefore, the Court should not issue any  
9 sanctions whatsoever on this case, or for me to pay attorney  
10 fees. That's what motion practice is about.

11 Furthermore, Carlin had to do with G, and our case  
12 had to be with E, but multiple Courts have found that to be  
13 okay, that the analysis is still the same. Even the Balke  
14 Court stated that. They found there to be a violation on the  
15 G analysis and on the E analysis.

16 Now I have no idea what kind of collection agency  
17 Mr. Arleo represents, but FDCPA, all agencies --

18 MR. ARLEO: One that follows the law --

19 THE COURT: Excuse me.

20 MR. LITVAK: -- applies to all collection agencies,  
21 the good and the bad.

22 I understand that he sent me the e-mail. I looked  
23 at that e-mail. We disagreed. I cannot dismiss a case  
24 because I get an e-mail from opposing counsel. I looked at  
25 his e-mail. I looked at the Balke decision. And I told him I



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1 disagree with you on that. That's it. We disagree with you  
2 on the Balke decision. So therefore, I did not believe that I  
3 had to dismiss that case.

4 Now, my partner I think mentioned in one of the  
5 letters that there have been other occasions where  
6 Mr. Arleo --

7 THE COURT: Your partner is who, Mr. Cohen?

8 MR. LITVAK: Cohen and other attorneys I know.  
9 They've been --

10 THE COURT: Excuse me, is your partner Mr. Cohen?

11 MR. LITVAK: Colleague.

12 THE COURT: I'm asking you a very simple question.

13 MR. LITVAK: Partner in the legal sense, no.  
14 Somebody I work with on some cases here and there, not in a  
15 legal sense.

16 THE COURT: Mr. Cohen noted his appearance in this  
17 case, didn't he?

18 MR. LITVAK: Yes, he did notice his appearance in  
19 this case.

20 THE COURT: He noticed his appearance after he was  
21 aware of the correspondence between you and Mr. Arleo. He was  
22 aware of that correspondence, he knew of the letter that  
23 Mr. Arleo sent?

24 MR. LITVAK: To the best of my knowledge, as far as  
25 I remember, he was aware of the correspondence, correct.

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1 THE COURT: He was.

2 MR. LITVAK: That e-mail that went back and forth,  
3 as far as I remember, he was aware about that correspondence.

4 THE COURT: And what was the purpose for Mr. Cohen's  
5 notice of appearance? Was he assisting you in connection with  
6 this case?

7 MR. LITVAK: Well, he just started practicing in the  
8 FDCPA field. He doesn't have that much experience in the  
9 FDCPA field. So he's looking to get experience, he would like  
10 to become a consumer lawyer. So he joined me on this case to  
11 litigate this case.

12 But the point I was trying to make is that there  
13 were other times where we did dismiss cases. Where Robert  
14 Arleo or other attorneys would e-mail us, would point  
15 something out, and we'll look at the issue and if we believe  
16 that opposing counsel is correct, we will dismiss the case.  
17 We have done it in the past. If I agreed with opposing  
18 counsel in this case, I would have done the same, but I  
19 couldn't.

20 Looking at the Balke decision, I reasonably thought  
21 that I had a good legal argument. Now I may have been wrong  
22 on the law or on the facts. But again, any doubt when it  
23 comes to sanctions that the Court wants to issue sua sponte,  
24 any doubt has to be resolved in favor of the drafter.

25 I'm affirming to this Court based on Balke I

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1 reasonably thought -- I might have been wrong -- but I  
2 reasonably thought I had a good legal argument.

3 I understand the Court did not agree with me in its  
4 decision. I respect that. That doesn't rise to the level  
5 where the Court needs to issue sanctions or make me pay  
6 opposing attorney's fees.

7 THE COURT: Mr. Litvak, if I understand you  
8 correctly, before I get into some other things, if I  
9 understand you correctly, it was your belief that Balke was  
10 correctly decided notwithstanding the fact that Avila would  
11 have compelled another conclusion; is that correct?

12 MR. LITVAK: I thought that --

13 THE COURT: Excuse me, Mr. Litvak, I would  
14 appreciate it if you would listen to my question and try and  
15 answer it. If it can't be answered yes or no, you can make  
16 whatever additions you wish to make a little later.

17 But if I understand you correctly, you believed that  
18 Balke was correctly decided notwithstanding that Balke  
19 differed from Avila?

20 MR. LITVAK: Correct. I thought that the Balke was  
21 distinguishing it from Avila. And I thought that Balke --

22 THE COURT: No, it wasn't distinguishing it. You  
23 thought that Balke, although it did not comply with the  
24 language of Avila, was nevertheless correctly decided.

25 MR. LITVAK: Yes. I thought that the Court in Balke

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1 was trying to extend Avila. Avila said you have to provide  
2 this disclosure that the balance may increase. I thought that  
3 Balke went a step further and now was requiring the debt  
4 collectors not just to state that they may increase, but also  
5 requiring debt collectors to state to provide more details by  
6 how much, what is the interest rate.

7 THE COURT: Mr. Litvak, the answer to the question  
8 that I've asked is, you believed that although Balke was  
9 contradictory to and did not comply with Avila, Balke was in  
10 some respect extending Avila, yes?

11 MR. LITVAK: Extending or trying to modify the Avila  
12 decision, correct.

13 THE COURT: The Court of Appeals or authority in  
14 Avila still is correct, is still the law in the Circuit at the  
15 time Balke was decided. So what you're saying, in effect, is  
16 Balke was incorrectly decided by the District Court, I think  
17 it was Judge Spatt.

18 MR. ARLEO: Magistrate Judge Tomlinson.

19 THE COURT: Let me just see if I understand what  
20 this is about. Mr. Timoshenko got a letter. By the way, what  
21 was the debt that Mr. Timoshenko incurred, he bought  
22 something?

23 MR. LITVAK: I'm not sure exactly what was the debt  
24 for.

25 THE COURT: You don't know what he owed the money

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1 for?

2 MR. LITVAK: No, I don't know, your Honor.

3 MR. ARLEO: I believe it was Bank of America credit.

4 MR. LITVAK: It's usually credit card.

5 THE COURT: It didn't make any difference whether  
6 it's a credit card for the purpose of the question I'm asking.  
7 The fact of the matter is, Mr. Timoshenko bought something and  
8 as a result of buying something he owed the merchant a sum of  
9 money.

10 MR. LITVAK: Correct.

11 THE COURT: Mr. Timoshenko doesn't dispute the fact  
12 that he incurred a debt, bought something that he didn't pay  
13 for. Doesn't dispute that, right?

14 MR. LITVAK: Correct, well --

15 THE COURT: The debt was just not paid at all. It  
16 was outstanding. So Mr. Timoshenko receives a letter telling  
17 him, Mr. Timoshenko you bought whatever it is you bought in  
18 effect, you incurred a debt of 2,000 some odd dollars, and you  
19 haven't paid for it. And so the letter said Mr. Timoshenko,  
20 as of the date of this letter you owe, your balance is  
21 \$2,435.48. That balance he doesn't dispute, \$2,435.48, he  
22 doesn't dispute that?

23 MR. LITVAK: At this time --

24 THE COURT: Excuse me, would you please listen to  
25 the question and answer it.

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1 MR. LITVAK: Sure.

2 THE COURT: Does he dispute the fact that his  
3 balance was \$2,435.48? He doesn't dispute that.

4 MR. LITVAK: I never discussed with him whether he  
5 disputed that balance or not.

6 THE COURT: Okay. Excuse me. He received this  
7 letter and says because of the interest or fees that may vary  
8 from day to day, the amount due on the day you pay me may be  
9 greater; hence, if you pay the amount shown above an  
10 adjustment may be necessary after we receive your check. In  
11 which event, we will inform you before the depositing the  
12 check for collection. And for further information please  
13 write or call Mr. Brickman and he leaves a number.

14 That notice was precisely the notice that was  
15 involved in Avila, almost word for word. Correct? Yes, yes?

16 MR. LITVAK: It was very similar.

17 THE COURT: So as I understand it, Mr. Timoshenko  
18 when he received this letter was terribly confused. He was  
19 mislead. He was deceived.

20 Let me read your complaint. It's a remarkable  
21 complaint. It's a complaint of 60 paragraphs, which involves  
22 a claim of a collection letter that you owe \$2,435, that you  
23 don't dispute, but the complaint is, you repeat the July 11  
24 letter stated, in part, as of this date your balance is and  
25 you repeat that in paragraph ten of your complaint. A debt

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1 collector has the obligation not just to convey the amount of  
2 the debt, but to convey such clearly.

3 What is it that was not conveyed clearly?

4 MR. LITVAK: By saying that it may increase you  
5 don't let the debtor know how much it will increase, at what  
6 interest rate.

7 Let's say he gets that letter, let's say Timoshenko  
8 gets that letter, and Timoshenko --

9 THE COURT: Excuse me. I take it Mr. Timoshenko got  
10 that letter and he felt confused and harassed, mislead, I  
11 don't know how much I really owe, I don't know what the  
12 interest rate is, I don't know what the fees are. I don't  
13 know at all anything about it. I better go and see a lawyer.

14 MR. LITVAK: Correct.

15 THE COURT: Is that what happened? He came to you  
16 and said, Mr. Litvak, I received a letter from a collection  
17 agency, I don't understand this at all? But the letter said  
18 if you have any questions call Mr. Brickman at 516 and so on  
19 and so forth. But he didn't do that. He said, gee, this  
20 letter is terribly confusing. I bought something, I haven't  
21 paid for it, I owe money, and I get this letter telling me  
22 that I owe \$2,425, which is correct. And it also says because  
23 of the interest or fees that may vary from day to day, the  
24 amount due on the day you pay may be greater. If you pay the  
25 amount shown above, an adjustment may be necessary after we

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1 receive your check. In which event, we will inform you before  
2 depositing the check.

3 That's specific language, exact language in Avila.  
4 And the Court of Appeals in Avila says that language is  
5 perfectly fine, it's not a violation of 6092(E), it's not a  
6 violation of 6092(G). And you were told that specifically,  
7 Avila is just as plain as can be.

8 But you submitted a complaint and you say a debt  
9 collection has the obligation not just to convey the amount of  
10 the debt, but to convey such clearly. 6092 prohibits a debt  
11 collector from using any false, deceptive or misleading  
12 representation or means in connection with the collection of  
13 any debt.

14 Is there anything in that letter that is false,  
15 deceptive or misleading?

16 MR. LITVAK: Correct, your Honor, the amount of  
17 debt. Because in my reasoning --

18 THE COURT: Excuse me, Mr. Litvak, what is there in  
19 your collection letter in that paragraph that is false or  
20 misleading?

21 MR. LITVAK: That's what I'm trying to explain, your  
22 Honor. If you give me an opportunity to speak, I would  
23 appreciate it. As I would --

24 THE COURT: If you would be responsive to the  
25 questions I ask, I would be very appreciative as well,



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1 Mr. Litvak.

2 MR. LITVAK: Your Honor, I've been trying to be  
3 responsive but I've been cut off without completely finishing  
4 my answer.

5 As I was saying before, I would like to begin by  
6 saying that the standard is an objective standard, not a  
7 subjective standard. It's irrelevant --

8 THE COURT: Mr. Litvak, don't teach me about what  
9 the standard is. I know very well of what the least  
10 sophisticated consumer is all about. I know very well about  
11 what the objective is.

12 But I'm asking you to tell me, Mr. Litvak, what is  
13 there about the collection letter which is false, anything?

14 MR. LITVAK: Well, it's misleading as to the amount  
15 of debt. Because looking at Balke, by just saying that the  
16 balance may increase you don't give enough information to the  
17 debtor to advise the debtor how much he needs to pay.

18 You can have the situation where the debtor, let's  
19 say pays the balance today thinking that he completely paid  
20 the balance in full. A year later he gets another collection  
21 letter for another thousand dollars. The debtor is thinking,  
22 what happened, I paid this balance a year ago, why am I  
23 getting this now for another thousand dollars? So that's an  
24 issue that could happen without clarifying or providing enough  
25 information to the debtor.

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1 THE COURT: It's not a question of what could  
2 happen. I'm asking you -- let me rephrase this.

3 The purpose of the Fair Debt Collection Practices  
4 Act is to avoid collection debt practices which would harass,  
5 mislead, abuse, debtors, correct?

6 MR. LITVAK: Yes.

7 THE COURT: What is there about this letter which  
8 harassed, misled, abused, coerced or any other way effected,  
9 injured in some emotional or practical way Mr. Timoshenko?

10 Mr. Timoshenko must have been confused. He must have reacted  
11 badly to this letter when he got it. What caused  
12 Mr. Timoshenko to come to your office and say, this letter,  
13 this letter is very upsetting to me. It's confusing to me.  
14 And I'm not going to call Mr. Brickman or whoever it is, but  
15 I'm going to go to my lawyer and have him file a complaint and  
16 sue because I'm being misled.

17 MR. LITVAK: Again, your Honor, the letter itself is  
18 misleading as to the balance. It doesn't provide enough  
19 information to the debtor.

20 THE COURT: Avila didn't think so. It's the exact  
21 same language that the Court of Appeals approved in Avila.  
22 They didn't say it's misleading.

23 MR. LITVAK: I agree. That's why we're relying on  
24 the Court in Balke, which in fact, which actually discussed  
25 Avila and Carlin. And that Court there stated that that's not

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1 enough, you got to give more than that. So that's why we're  
2 relying on Balke this was a plausible claim, your Honor.

3 You cannot say -- the Court can disagree with that  
4 reasoning, but you cannot say that subjectively this was  
5 brought in bad faith without color. The only thing I was  
6 trying to do, as I stated in my order to show cause and in the  
7 to reply is to extend or modify the Second Circuit precedent,  
8 something that has been done many, many times before by other  
9 attorneys and has never been found to be sanctionable. Judge  
10 Cogan --

11 THE COURT: Mr. Litvak, don't ever tell me what some  
12 other judge did. That's not very persuasive for me. I'm not  
13 interested in what some other judge did. I'm interested in  
14 what you did and what is before me in this case.

15 As I understand it, Mr. Timoshenko came to you and  
16 said to you, I've received a collection letter, I'm mislead, I  
17 don't understand it, I'm upset, I feel harassed. What are  
18 they telling me? They tell me I owe \$2,435, and when I send  
19 my check if somehow or other there was interest or some other  
20 fee I won't deposit the check, I'll let you know what it is  
21 that I think I need more of.

22 What am I mislead about? What am I mislead about?

23 MR. LITVAK: The amount of the balance due.

24 THE COURT: Thank you very much, Mr. Litvak.

25 MR. ARLEO: May I bring up one point that clearly

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1 demonstrated his subjective bad faith. He just told you that  
2 based upon that letter his client could pay that amount and  
3 then a year later come back and be all confused as to why it  
4 wasn't resolved when the letter told him that exact  
5 advisement.

6 It's clearly subjective, your Honor. I believe the  
7 Court has every basis to react.

8 THE COURT: Anything else you want to say to me,  
9 Mr. Litvak?

10 MR. LITVAK: Nothing else, your Honor.

11 THE COURT: You'll be advised. Anything further?

12 MR. ARLEO: No.

13 THE COURT: How much time did you spend, so on and  
14 so forth, with respect to your opposition to this complaint?

15 MR. ARLEO: To the complaint or to the order to show  
16 cause?

17 THE COURT: In general.

18 MR. ARLEO: In all truth and candor to the Court, I  
19 charge my clients a flat fee. I'll tell you why you do that.

20 THE COURT: Don't tell me why, just give me a  
21 number.

22 MR. ARLEO: I believe I charged \$5,000 for the case.

23 THE COURT: \$5,000.

24 MR. ARLEO: Or 35, one or the other.

25 THE COURT: So a collector is incurring the fee, an

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1 attorneys fee of over \$5,000, to collect the debt of \$2,435  
2 and change. Right? Because the debtor is confused and  
3 mislead by false, misleading, deceptive information, which the  
4 United States Court of Appeals for the Second Circuit says is  
5 perfectly fine, there is nothing wrong with it.

6 MR. LITVAK: Your Honor, again Balke came up --

7 THE COURT: I don't want to know anything about  
8 Balke. I'm familiar with Balke. We made reference to Balke  
9 in our decision, didn't we? If Balke was wrongfully decided,  
10 then there should have been an appeal by the collecting agency  
11 and said there is something wrong with your decision judge,  
12 because what I did is essentially Avila. But apparently that  
13 hasn't been done or, if it is upon appeal I don't know.

14 But the point of the matter is, Mr. Litvak, I don't  
15 think it's for you to ignore the Court of Appeals in the  
16 belief that if I ignore the Court of Appeals in a case which  
17 is precisely on point with the Court of Appeals I may  
18 encourage the Court of Appeals to change the law. That's what  
19 you're telling me.

20 MR. LITVAK: That's what has been done on many  
21 occasions before. I wasn't ignoring it, your Honor. I was  
22 trying to modify or extend an existing precedent. That has  
23 been done on many, many occasions. It has never been found to  
24 be sanctionable. That's what motion practice is about, to  
25 debate the law.

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1           THE COURT: What else is there that you want to  
2 teach me about motion practice and the obligation of the  
3 lawyer with respect to following very clear, undistinguished  
4 precedent of the Court of Appeal? What else do you want to  
5 tell me? What else do you want to teach me about motion  
6 practice or the practice of law?

7           MR. LITVAK: I'm not trying to teach you. I'm  
8 trying to explain my logical reasoning in bringing this  
9 complaint.

10          THE COURT: Your logical reasoning was you were  
11 going to try to extend the holding in Avila. Is that the  
12 idea?

13          MR. LITVAK: Of course, yes.

14          THE COURT: Is that what Balke did?

15          MR. LITVAK: I believe at that time it was trying to  
16 do that. I may have been wrong on that issue. But it doesn't  
17 rise to the level of subjective bad faith, not at all.

18          THE COURT: Did you make that known to Mr. Arleo?  
19 You're absolutely right, Mr. Arleo, what it is that I'm doing  
20 is clearly contrary to Second Circuit law, but I'm going to  
21 continue to persist because it may be that I'll get the Second  
22 Circuit to change the law, or get Judge Glasser to say the  
23 Second Circuit was wrong. This is perfectly in accord with  
24 the Fair Debt Collection Practices.

25          MR. LITVAK: In that e-mail I believe I responded, I

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1     replied with the holding in Carlin and Balke, if I remember  
2     correctly. I was pointing the opposing counsel to those  
3     decisions. After that, we had never really communicated as to  
4     that issue again. But I did convey to my opposing counsel  
5     that I'm relying on Carlin and on Balke in bringing -- and I  
6     relied on Carlin and Balke to bring this complaint.

7             THE COURT: I just want to make sure that I still  
8     haven't gotten an answer to it, but I would like to know, when  
9     Mr. Timoshenko got this letter he was confused and felt  
10    mislead. And when he got this letter telling him that you owe  
11    \$2,435, it may be more, and when you send me a check and it  
12    isn't enough, we'll let you know. We won't deposit the check  
13    until we let you know.

14            He read that, he was confused, he said he better  
15    come and visit a lawyer, is that what happened?

16            MR. LITVAK: My --

17            THE COURT: Is that the way it happened?  
18    Mr. Timoshenko came to you and said I got this letter telling  
19    me I owe money, I don't understand it, I'm terribly confused  
20    and being mislead?

21            MR. LITVAK: That's not the standard, whether he was  
22    confused or not. It's an objective standard. They send this  
23    letter out to hundreds, if not thousands, of debtors. He's  
24    not the only person who got this letter.

25            THE COURT: Do you want to tell me that I'm

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1 interfering with your answer, that I'm cutting you short? I  
2 still haven't gotten an answer to what seems to me to be a  
3 very simple question. But it's obvious that you really don't  
4 want to answer that question, do you? Because that's not the  
5 way it happened.

6 MR. LITVAK: Well, because when somebody comes to me  
7 it's not the issue whether that person is confused or misled.  
8 It's an objective standard based on the letter.

9 THE COURT: All I'm asking you, if you wish to  
10 answer it or stand on some attorney-client privilege, which I  
11 don't think is applicable, but whatever it is, if you don't  
12 want to answer it you don't have to, but the simple question  
13 that I'm asking you is, did Mr. Timoshenko come to you and say  
14 I received a letter, I'm upset, I'm misled, I don't understand  
15 what I owe. I came to you to tell me what this is all about.  
16 And you bring a lawsuit saying that there is a violation.

17 Did he come to you telling you that I don't  
18 understand this letter, I'm misled, I'm confused?

19 MR. LITVAK: It's not something I would like to  
20 discuss, your Honor. I think it's irrelevant, completely,  
21 what Mr. Timoshenko said to me or not.

22 THE COURT: Mr. Litvak, I think I can probably  
23 compel you to answer that question at the risk of being  
24 contemptuous; but if you don't want to answer it, don't.

25 Don't give me these answers about objective



## PROCEEDINGS

1 standards and all the rest of it. I'm not asking you about  
2 that. I'm asking you a very simple question, which I can't  
3 get an answer to. Thank you very much.

4 MR. LITVAK: Thank you.

5 (Whereupon, the proceedings concluded.)  
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